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82-1148

No. _____

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOHN A. QUEEN AND QUEEN ELECTRIC MANUFACTURING COMPANY, *Petitioners*

*v.*

TENNESSEE VALLEY AUTHORITY, MIKE BUTLER AND CRAVEN CROWELL, *Respondents*

## Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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## QUESTIONS PRESENTED FOR REVIEW

1. Are the Tennessee Valley Authority and its employees immune from civil liability for defamatory statements made in the exercise of its proprietary functions rather than governmental functions?

2. Are Petitioners entitled to a judicial declaration that the statements are defamatory and to injunctive relief to prevent further publication of the defamatory statements if the TVA and its officials are immune from civil liability?

## LIST OF PARTIES TO THE PROCEEDING BELOW

The caption of the case in this Court contains all parties named in the proceedings below, namely, JOHN A. QUEEN, QUEEN ELECTRIC MANUFACTURING COMPANY, TENNESSEE VALLEY AUTHORITY, MIKE BUTLER, and CRAVEN CROWELL.

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## OPINIONS DELIVERED IN COURTS BELOW

The opinion of the United States District Court for the Eastern District of Tennessee, Northern Division, is reported at 508 F.Supp. 532 (E.D. Tenn. 1980) and is attached to this petition as Appendix A. The opinion of the United States Court of Appeals for the Sixth Circuit, attached as Appendix B, is reported at 689 F.2d 80 (6th Cir., 1982).

## GROUNDS FOR JURISDICTION

The judgment of the Sixth Circuit was entered on September 24, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## STATUTES INVOLVED

A. The Tennessee Valley Authority Act of 1933 creating the Tennessee Valley Authority provides in part as follows:

> "Except as otherwise specifically provided in this chapter, the Corporation—
>
> . . .
>
> (b) May sue and be sued in its corporate name." 16 U.S.C. §831c.

The purpose clause of the Act is 16 U.S.C. §831 and is found in Appendix C.

B. The Federal Tort Claims Act provides in part as follows:

> "The provisions of this chapter and section 1346(b) of this title shall not apply to —
>
> . . .

(1) Any claims arising from the activities of the Tennessee Valley Authority." 28 U.S.C. §2680(l).

## STATEMENT OF THE CASE

### A. SUMMARY

On August 12, 1980 John A. Queen and Queen Electric Manufacturing Company filed their Complaint in the United States District Court for the Eastern District of Tennessee, Northern Division, against the Tennessee Valley Authority (TVA), Mike Butler and Craven Crowell asserting a common law action for defamation. The Complaint prayed for compensatory and punitive damages resulting from the defamation totaling $2,000,000.00. Alternatively, a judicial declaration was sought that the statements were defamatory and for injunctive relief to prevent further publication of said statements in the event that it was determined that the TVA and its employees were entitled to the protection of sovereign immunity.

The District Court granted a summary judgment holding that the Defendants were immune from prosecution of civil damages for defamatory statements and refused to issue an injunction without addressing the defamation issue. The Sixth Circuit affirmed the judgment of the District Court with one judge dissenting.

### B. PARTIES

John A. Queen and Queen Electric Manufacturing Company developed, manufactured and distributed primarily on a wholesale basis an energy savings product known as the "Phase Liner." Queen Electric has sold on

its own and through numerous independent distributors more than 6,000 of these units to various residential, commercial and industrial customers and guaranteed to these customers that their electric bill would be reduced under certain circumstances.

Mike Butler, Manager of Media Relations, Craven Crowell, Director of Information, and other employees of TVA are alleged to have knowingly made false and defamatory statements that Queen Electric and John Queen had filed and lost a $5,000,000.00 lawsuit against the TVA; that they were prohibited from advertising the Phase Liner as an energy savings device in Colorado; and that the Phase Liner was not a genuine energy conservation device which would result in any benefit to residential or commercial users. Queen alleged that as a result of these defamatory statements he had been greatly damaged in his name, reputation and credit and had suffered much humiliation, embarrassment, mental pain and anguish. Queen Electric alleged that it had suffered a loss of profits in expanding its distributorships and in selling its Phase Liner units. Compensatory and punitive damages of $2,000,000.00 were sought by the Plaintiffs.

Affidavits of Mike Butler and Craven Crowell filed by them in support of the Motion for Summary Judgment admitted that the alleged defamatory statements about the Phase Liner had been made and their statement that Queen and Queen Electric had lost a $5,000,000.00 defamation lawsuit against TVA was false.

## C. THE DISTRICT COURT'S DECISION

The District Court held that the employees were entitled to absolute immunity from civil liability because they were acting within the scope of their duties. 508 F.Supp. 535. Based on this holding, the Court held that under Tennessee law the TVA was not vicariously liable because its agents were not liable. 508 F.Supp. 535. The Court also declared that as a matter of federal law the TVA was also entitled to absolute immunity the same as its employees. 508 F.Supp. 536.

Declaratory and injunctive relief were denied on the basis that the First Amendment authorized the TVA to comment on matters of public interest and the debate over the merits of the Phase Liner was of public interest. 508 F.Supp. 536. In denying the declaratory and injunctive relief, the Court considered it of no consequence that the Defendants were immune from civil liability. 508 F.Supp. 536. Previous to its ruling on the Motion for Summary Judgment, the District Court had denied a temporary injunction on the basis that there was an adequate remedy at law.

## D. THE SIXTH CIRCUIT'S DECISION

The Sixth Circuit affirmed the judgment of the District Court. 689 F.2d 81. The Court held as the District Court had that the TVA employees were entitled to absolute immunity from suit in their personal capacity for statements made in the course of the performance of their duties. 689 F.2d 84. It was noted by the Court that the doctrine of absolute immunity has been criticized by

very reputable authorities and does cut off meritorious claims. 689 F.2d 84.

Concerning the liability of the TVA, the Court's opinion pointed out specifically that it is very clear that the TVA does not enjoy sovereign immunity because of the language selected by Congress in the enabling act. 689 F.2d 85. The legislative history of the Act was traced showing that the House bill which contained the final language on liability "placed no limitations whatever upon the suability of the corporation, so that all persons who had a cause of action against the corporation might have their day in Court." 689 F.2d 85. The Court's opinion also mentioned that the Supreme Court had stated in *F.H.A. v. Burr*, 309 U.S. 242, 245, 60 S.Ct. 488, 490, 84 L.Ed. 724 (1940) that the "sue and be sued" clauses of the Act should be construed broadly. 689 F.2d 85. Yet, in spite of the congressional mandate and the admonition of this honorable Court, the Sixth Circuit granted immunity to the TVA because the actions taken by the employees were pursuant to authorized statutory activities. 689 F.2d 86.

In affirming the District Court's decision not to issue an injunction against defamatory statements, the Sixth Circuit held that there was no showing that the lower court abused its discretion in refusing to issue the injunction. 689 F.2d 86. The Court reasoned that an injunction was not appropriate to resolve a dispute that is "best resolved by the expression, and not the suppression of information and ideas." 689 F.2d 86.

## REASONS FOR GRANTING THE WRIT

The effect of the Sixth Circuit's decision gives the TVA and its employees acting within the course and scope of their duties absolute immunity from prosecution for civil damages for their torts contrary to the clear expression of the Congress as set forth in the Act creating the TVA; denies the right to have a judicial determination that statements made by the TVA and its employees are defamatory; and denies any judicial relief from further publication of judicially determined defamatory statements. Thus, this federal corporation and its employees are liable only for ultra vires acts and enjoy a more favored position than the federal government itself because of the liability imposed on the federal government through the Federal Tort Claims Act.

### A. THE TENNESSEE VALLEY AUTHORITY AND ITS EMPLOYEES BY CONGRESSIONAL MANDATE DO NOT ENJOY SOVEREIGN IMMUNITY IN DISCHARGING THE PROPRIETARY FUNCTIONS OF THE TVA.

In creating the Tennessee Valley Authority, the Congress made itself very clear in the enabling act that the TVA was not to enjoy sovereign immunity. 16 U.S.C. §831c(b). The legislative history of the Act reveals the intent of the Congress in authorizing the TVA to "sue and be sued in its corporate name."

> "The Senate amendment limited the suability of the corporation solely to suits for the enforcement of contracts and the defense of property. The House bill placed no limitations whatever upon the suability of the corporation, so that all persons who had a

> cause of action against the corporation might have their day in court. The House provision was written into the conference amendment in the interest of justice." H.R. Rep. No. 48, 73d Cong., 1st Sess. 16 (1933).

For almost forty (40) years, the federal courts have held TVA to be responsible in damages for wrongs committed within the commercial field of its activities. *Grant v. Tennessee Valley Authority*, U.S.D.C., E.D., Tenn., 49 F. Supp. 564, 566 (1942). In the *Grant* case, the court noted that TVA was created for the primary purposes "of promoting navigation and controlling floods." 49 F.Supp. 564. While these governmental activities of TVA do enjoy absolute immunity, its activities in the commercial area do not:

> "*But the functions of the Defendant [TVA] in the commercial field are entirely different.* Upon principle and authority, it is quite clear that government should respond in damages for wrongs committed when it is engaged in the same activities as its citizens. It is my judgment that *Congress intended that the Defendant can be sued for all wrongs committed for conduct pertaining to its generating, use and sale of electric energy* made from the power created by its dams."[1] 49 F.Supp. 566.

This honorable Court in construing "sue and be sued" clauses in congressional legislation creating federal agencies and corporations has written:

> "Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it

[1]Emphasis ours throughout, unless otherwise noted.

> to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to 'sue and be sued' is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense." *FHA v. Burr*, 309 U.S. 242, 245, 60 S.Ct. 488, 490, 84 L.Ed. 724 (1940).

The federal courts and the courts of the various states have long noted that sovereign immunity does not apply to the government when it acts in a proprietary capacity. With respect to the TVA, the federal courts have declared it to be liable when it acts improperly in its proprietary capacity. *Latch v. Tennessee Valley Authority*, U.S.D.C., N.D. Miss., 312 F.Supp. 1069, 1072 (1970). The *Latch* opinion contains an excellent and accurate discussion of the scope of the liability of the TVA and the reasons for that liability. For the convenience of the Court, the pertinent portion of the opinion is set forth as follows:

> "*Clearly §831c(b) relinquished any sovereign immunity which TVA might have had as a government agency or corporation for proprietary functions by rendering it liable to direct lawsuit like any other litigant.* Such being the case, TVA was, before the enactment of the Federal Tort Claims Act, liable for its torts as to nongovernmental acts relating to the distribution and sale of electric power. . . . Without the benefit of Committee reports with

respect to the exceptions contained in §2680, it would appear to this court that TVA had a recognized 'common law' liability for tort in the exercise of its several proprietary functions and that Congress was quite unwilling to subject TVA to tort liability for its far ranging governmental activities in the fields of national defense, navigation and flood control, as coverage under the Federal Tort Claims Act would have done. It is to be noted that the complaint in the case deals with TVA's activities in the distribution and sale of electric power, and, therefore, would involve a determination of tort liability, quite apart from the scope of the Federal Tort Claims Act, including its exceptions." 312 F.Supp. 1072.

The statements made by the TVA employees that Queen Electric and John Queen had filed and lost a $5,000,000.00 lawsuit against the TVA; that they were prohibited from advertising the Phase Liner as an energy savings device in Colorado; and that the Phase Liner is of no benefit to residential or commercial users are not statements made pursuant to the discharge of duties of TVA's governmental functions of national defense, flood control or navigation. These statements were all made in connection with duties being discharged in the area of commerce.

This Court has consistently held that no man is above the law and that those in government from the highest to the lowest are obligated to obey it. *Butz v. Economou*, 438 U.S. 478, 506, 98 S.Ct. 2894, 57 L.Ed.2d 895, 915-916 (1978). The reasons for sovereign immunity in carrying out governmental functions have not and should not be extended to governmental officials acting in proprietary capacities. In the latter situation those individuals

should be held accountable for their torts the same as nongovernmental officials acting in the same arena. There is no sound public policy reason to disregard the clear mandate of the Congress in authorizing the TVA to be sued for its torts.

Judge Merritt is absolutely correct in the dissenting opinion filed in this cause in declaring:

> "The old doctrine of absolute immunity should be declared dead except in the case of a few officials for whom there are impelling constitutional or policy reasons for such an immunity." 689 F.2d 87.

The recent decision of this honorable Court in *Nixon v. Fitzgerald*, -U.S.-, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), clearly indicates the Court is moving in the direction of restricting immunity from prosecution as opposed to expanding the coverage of immunity. Had the Congress desired the TVA to enjoy absolute immunity it would not have placed an authorization for suing the corporation in the enabling act. The Congress reaffirmed its intention for the TVA to be sued under the enabling act by expressly excluding the TVA from the Federal Tort Claims Act. 28 U.S.C. §2680(l).

In seeking to justify its decision, the Sixth Circuit stated that the actions of the TVA which gave rise to the lawsuit were taken pursuant to a legislative mandate to "make studies, experiments and determinations to promote the wider and better use of electric power for agricultural and domestic use, or for small or local industries." 689 F.2d 86. However, an examination of the entire section of the Act from which the Court quoted reveals that these studies, experiments and determina-

tions are to be made in connection with the sale of surplus electric power and not in connection with energy saving devices being sold in the commercial arena. This is seen clearly from the first sentence of §831i, to wit:

> "The Board is empowered and authorized to sell the surplus power not used in its operations, and for operation of locks and other works generated by it, to States, Counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth . . ."

All of §831i is reproduced in Appendix C. In any event, the important point to note is that the defamatory statements were made in connection with proprietary functions and not governmental ones. Accordingly, the rule of law announced by this Court in *Barr v. Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959) is inapplicable to this case. In *Barr* and the other immunity cases, the individuals that were sued were engaged in governmental functions. In the cause at bar, the issue relates to a federal corporation that has both governmental and proprietary powers. Individuals' rights are severely threatened if this Court permits the decisions below to stand permitting governmental officials to commit torts while carrying out duties of a nongovernmental nature.

## B. DECLARATORY AND INJUNCTIVE RELIEF AGAINST FURTHER PUBLICATION OF DEFAMATORY STATEMENTS IS PROPER WHEN THERE IS SOVEREIGN IMMUNITY FROM THE PAYMENT OF CIVIL DAMAGES.

As a general rule, injunctive relief is an inappropriate remedy in a common law defamation action. Usually de-

claratory relief is useless to a person who has already been injured. *Butz v. Economou*, 438 U.S. 478, 504, 98 S.Ct. 2894, 57 L.Ed.2d 895, 915 (1978). However, declaratory and injunctive relief have been held by this Court to be appropriate remedies where there is immunity from damages for libel or slander. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 71 S.Ct. 644, 95 L.Ed. 817, 837 (1951). While an individual may not be able to recover monetary damages for defamatory statements made about him, a judicial declaration that the statements are defamatory is exceedingly valuable. The defamed individual can publish this judicial declaration among those who have been exposed to the defamatory statements and, thus, counteract or stop the harm that has been done either in whole or in part. Similarly, an injunction against further publication of judicially determined defamatory statements is of great value to the defamed individual and will stop further harm to that individual.

The decision of the Sixth Circuit deprives Queen and Queen Electric of these very valuable rights.

The First Amendment has never been held by any court to authorize or protect defamatory statements. It can never be in the public interest to permit further publication of judicially determined defamatory statements. Accordingly, Queen and Queen Electric are entitled to a judicial determination of whether or not the alleged statements are defamatory and if they are found to be such, then to an injunction against their further publication.

## CONCLUSION

The Sixth Circuit should never have affirmed the granting of the Summary Judgment by the District Court. The Tennessee Valley Authority Act of 1933 unquestionably denies absolute immunity to the TVA and its employees acting in pursuit of the proprietary functions of the TVA and renders the TVA and those employees liable for civil damages as a result of the commission of common law torts. Alternatively, Queen and Queen Electric are entitled to a judicial declaration of whether or not the statements are defamatory and if found to be defamatory, then to an injunction of further publication of those statements.

WHEREFORE, PREMISES CONSIDERED, John A. Queen and Queen Electric Manufacturing Company respectfully request this honorable Court to grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the decision of this cause.

Respectfully submitted,

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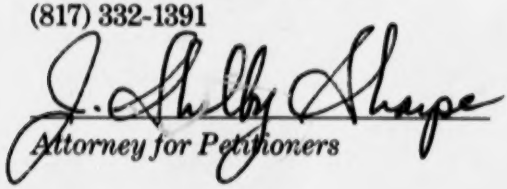
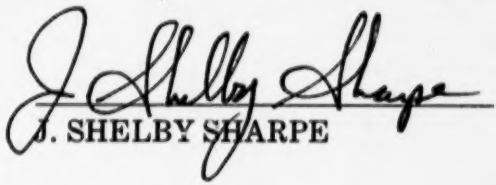


*Attorney for Petitioners*

## CERTIFICATE OF SERVICE

A copy of the foregoing Petition for Writ of Certiorari has been deposited in the United States Post Office, first class mail, prepaid, addressed to all counsel of record at their post office addresses this 22nd day of December, 1982.



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